United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-7385

United States Court of Appeals

FOR THE SECOND CIRCUIT

W. T. GRANT COMPANY,

Plaintiff-Appellee,

—against—

MARK S. HAINES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7385

W. T. GRANT COMPANY,

Plaintiff-Appellee,

- against -

MARK S. HAINES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT

THE ISSUES PRESENTED FOR REVIEW

1) Did the District Court err in refusing to disqualify the law firm of Liebman, Eulau, Robinson & Perlman from representing plaintiff W. T. Grant Company ("Grant") for violating the Code of Professional

Responsibility by interrogating a defendant in the absence of counsel, after commencing a lawsuit against him, while concealing from him that such a lawsuit had been commenced?

2) Did the District Court have the power to order the property of a defendant located outside of the State of New York attached and continue said attachments after vacating service of the summons and complaint and dismissing the action against him?

PRELIMINARY STATEMENT

This is an appeal from that portion of an order of June 3, 1975 (A. 264-265)*/ by District Judge Charles L. Brieant, Jr. that (1) denied the motion by defendant Mark S. Haines ("Haines") for disqualification of the firm of attorneys representing plaintiff or dismissal of the action as against him due to violation by said firm of the Code or Professional Responsibility, and (2) continued in effect orders of attachment against defendant Haines after dismissal of the complaint. The opinion of the District Judge,**/ dated May 8, 1975, on which the order is based, is not reported.

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*/ References to the Appendix pages are noted as (A. ___).

**/ A. 237-263.

STATEMENT OF THE CASE

The original complaint alleged a claim under §4 of the Clayton Act and §1 of the Sherman Act, asserting damages of $5 million, which were to be trebled, as the result of a series of agreements purportedly eliminating competitive leasing opportunities at the shopping center stores of W. T. Grant Company due to alleged bribes and kickbacks paid to Grant's real estate department employees. An additional Count pleaded violation of §340 of the New York General Business Law sounding in commercial bribery. The remaining 27 Counts comprised 69 numbered paragraphs and asserted claims of unfair competition, intentional tort, constructive trust, fraud, breach of fiduciary employment duties and related matters. The Court's jurisdiction of these state law or common law claims was allegedly pendent.

A number of defendants moved pursuant to Rule 12 for dismissal of the antitrust claims for failure to state a claim; for dismissal of the pendent claims; and for dismissal due to improper personal service and improper venue. Additionally, defendant Mark S. Haines moved to dismiss due to the violation by plaintiff's counsel of the Code of Professional Responsibility, or in the alternative, to disqualify said counsel from further representing plaintiff in the litigation.

In opposition to Mr. Haines' motion to dismiss or disqualify counsel for plaintiff filed with the District Court a transcription of their interrogation of Mr. Haines without furnishing a copy to his counsel.

The District Court, in a 25-page decision dated May 8, 1975, dismissed the antitrust count as to all defendants for failure to state a claim, and the remaining counts due to the absence of subject matter jurisdiction. However, the Court granted plaintiff leave to serve and file an amended complaint, repleading counts other than Count I and pleading diversity of citizenship as a basis for federal jurisdiction. The Court also vacated personal service of the summons and complaint on Mr. Haines and co-defendant Daniel Quinlan and denied Haines' motion to dismiss or disqualify due to the conduct of plaintiff's counsel. The Court continued in existence attachments, and levies on assets pursuant to such attachments, pending the filing of an amended complaint within 20 days. Plaintiff, within the requisite 20 days, filed an amended complaint by the same firm of attorneys who were the subject of Mr. Haines' original motion and who represent plaintiff on this appeal. */

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*/ The order below is appealable as a final order pursuant to 28 U.S.C. §1291. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974); Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

Following the filing of the notice of appeal counsel for appellant requested of Grant's counsel a copy of the transcript of the January 31, 1975 interrogation for inclusion in the appendix on appeal. That request was refused. A motion for its production made to the District Judge was denied but the District Judge ordered that the transcript be forwarded to the Court of Appeals as an in camera exhibit (A. 380). Appellant moved the Court of Appeals for removal of the in camera restriction, which motion was granted by Judge Oakes by order dated September 3, 1975.

STATEMENT OF FACTS

W. T. Grant Company, a financially troubled operator of retail stores throughout the country, burst into the headlines of the financial page of the New York Times on February 1, 1975 with press conference announcements that three of its real estate executives had been fired for allegedly taking kickbacks from shopping center developers (A. 144-148). The news stories reported that a $25 million antitrust suit already had been filed against the former executives (A. 150) and that the penal law of several states had been violated (A. 148).

Indeed, the original complaint in this action had been filed the morning prior to the news stories in the following bizarre fashion.

A meeting of the Real Estate Review Board of Grant's had been called by Mr. James G. Kendrick, President of the company, to be held in Grant's New York offices at 9:00 A.M. on January 31, 1975. Unbeknownst to most of the prospective attendees at the meeting no intention existed on the part of Grant to hold such a meeting. Grant, its executives, house counsel and outside attorneys had been laboring for over a week at preparation of a federal court lawsuit making antitrust, commercial bribery and a variety of common law claims against numerous defendants, including Mark S. Haines, who was the Southern Regional Director of Grant's real estate department (A. 249-50).

Instead of firing its employees and suing them, or suing them and then firing them, Grant chose to sue, conceal the suit, interrogate the employees, serve them at the conclusion of the interrogation, and use the fruits of the interrogations to prosecute the litigation already instituted.

The meeting called for 9:00 A.M. brought real estate department members to New York City from various parts of the country. While they sat at the Grant offices

after 9:00 A.M. waiting for instructions, the Grant outside attorneys were at the Federal Courthouse where, at 9:43 A.M., they filed with the Clerk of the Court a 32-page complaint pleading 29 separate counts. They then filed affidavits under Rule 4(c), F. R. Civ. P., for orders under local Rule 12 permitting the outside lawyers to make service of process upon the various defendants rather than have the United States Marshal do so. At 10:45 A.M. the same lawyers made ex parte application before District Judge Charles L. Brieant for an order to show cause seeking a preliminary injunction against the defendants' transfer of any assets as well as substantial orders of attachment. Their application contained provisions for temporary restraining orders and issuance of immediate orders of attachment.

The District Judge struck the provision for a temporary restraining order (A. 106; 108) and made the application for a preliminary injunction and orders of attachment returnable on Monday morning at 9:00 A.M., provided that the papers and the summons and complaint were personally served upon defendants by 4:30 P.M. on January 31, 1975 (A. 108). The District Judge was, of course, not informed of any of the activities taking place at the Grant offices.

Meanwhile, at the Grant offices at 1515 Broadway, New York, New York, the prospective attendees at the real

estate committee meeting were told that the meeting was called off but that they should not leave (A. 247; 175). They were told of none of the events which were taking place or had taken place at the District Courthouse (A. 248).

Starting at about 9:30 A.M. several of the regional real estate executives were taken into separate rooms where they were interrogated at length by outside counsel for Grant.*/ In particular, Mr. Haines was taken into a room with Allen J. Kirschner, Esq., a member of the firm of Grant's outside attorneys, who was accompanied by Robert J. Kelly, Esq., vice president and general counsel of Grant (A. 176).

At the outset of the interrogation Mr. Haines was asked only whether he had any objection to the interrogation being tape-recorded rather than burdening Mr. Kirschner with handwriting lengthy notes (A. 9; Haines Aff'd., A. 176). Haines said he had no objection to the tape recording (A. 9). It has never been claimed by Grant that Mr. Haines was told before the interrogation that (1) a lawsuit seeking some $15 million in damages and extraordinary relief directed toward his property and intangible assets had been filed against him, or (2) that a decision had been made to discharge

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*/ The transcript of the interrogation of Mr. Haines may be found at pp. 9-40 of the Appendix.

him, or (3) that he should seek the counsel of an attorney immediately and before he submitted to the interrogation. Mr. Haines was interrogated over a time span of approximately 5-1/2 hours by Mr. Kirschner in the company of Mr. Kelly (A. 253). There was a break in the interrogation during the course of which Haines was given an electronic lie detector test (A. 187-191; 253).

Mr. Haines was given the impression that if he cooperated and gave satisfactory answers there was an excellent possibility that he could keep his job (A. 254-256).

The proceedings continued from approximately 9:00 A.M. to 3:05 P.M. when, for the first time, the attorneys informed Mr. Haines of the pendency of the lawsuit and served the summons, complaint and other papers upon him (A. 248).

The Court below found that the calling of the real estate committee meeting was a mere "sham, a ruse or artifice" designed to lure Haines and other out-of-state residents to New York for the purposes of serving them with process as well as interrogating them as to their alleged misconduct (A. 248). The Court also found that it was ". . . preposterous to suggest that these defendants could have done or said anything by way of protestations of innocence, which would have dissuaded plaintiff from serving

process on them before their departure from the state." (A. 249). Judge Brieant noted that the complaint had been in preparation for at least a week prior to January 31, that press releases announcing the lawsuit and Grant's discharge of the defendants had been in preparation and appeared in time for printing in The New York Times of Saturday, February 1, 1975 (A. 249-50).

In addition to the substantive information elicited during the interrogation, which had all the aspects of a full deposition on oral questions, counsel for Grant asked Mr. Haines to sign documents giving them authority to secure financial and other personal information which otherwise would not have been available to them (A. 26). They asked for and secured written authorizations to examine into the following subjects: tax matters; credit cards; department store charges; Internal Revenue Service filings; financial documents at banks (A. 26). They also made inquiries and received answers as to the location of his assets, bank accounts, stock certificates and real property (A. 18, 26; 39), and the financial circumstances of his wife and her employment (A. 25). All of this information was elicited, as found by the District Court, as part of an ". . . apparent attempt to mislead in that the attorney implied that there was uncertainty and a possibility that Haines might be able to exculpate himself and keep his job." (A. 256).

Mr. Kelly, the vice president and general counsel of Grant, who was present during the entire interrogation, filed several affidavits in the ensuing litigation which made reference to and relied upon alleged admissions made by Mr. Haines, as well as other defendants, during the course of the interrogation (A. 205; 233; 234; 236). Allan J. Kirschner, Esq. also filed affidavit statements with respect to alleged admissions by Mr. Haines during the interrogation (A. 212).

On Monday, February 3, 1975, counsel for several defendants appeared on the return of the motion. The application for a preliminary injunction was denied, but attachments were ordered entered against the property of Mr. Haines located anywhere in the United States, as well as property, wherever located, of several other defendants (A. 137-140).

ARGUMENT

POINT I. THE CONSTRUCTION OF DISCIPLINARY RULE 7-104(A) BY THE DISTRICT COURT WAS ERRONEOUS.

The Court below was called upon to determine whether the conduct of counsel for plaintiff on January 31, 1975, consisting of the filings and representations made at the United States Courthouse and their simultaneous conduct of interrogations at the offices of Grant, constituted

violations of the Code of Professional Responsibility sufficient to require dismissal of the complaint as to Mr. Haines or the disqualification of said counsel from further appearing in the action. The particular Disciplinary Rule in question is DR 7-104(A)*/ which provides in two pertinent sub-paragraphs as follows:

> "DR 7-104 Communicating With One of Adverse Interest.
>
> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

There was no dispute below concerning the factual circumstances surrounding the conduct of plaintiff's counsel or the interrogation. Indeed, the Court found that

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*/ Adopted by the New York State Bar Association effective Jan. 1, 1970. DR 7-104(A)(1) was derived from former Canon 9 of the Canons of Professional Ethics and in substance the new rule is identical with the old Canon.

plaintiff and its attorneys had effected a ruse by which Mr. Haines and others were lured to New York to attend a meeting of Grant's real estate department when in fact the purposes of the "meeting" were to effect personal service upon them and to interrogate them concerning the subject matter of the litigation (A. 248). The Court also found that approximately 5-1/2 hours of interrogation took place with questions being asked by plaintiff's attorneys and Grant's house counsel (A. 253). The Court found that Mr. Haines and others were asked to and did submit to an electronic "lie detector" test (A. 253).

There was no dispute, and the Court found, that the identity of the members of the law firm representing Grant was made known to Mr. Haines as well as the fact that their representation consisted of looking into suggestions or charges of commercial bribery. These attorneys implied to him and to others that there was a possibility that by making a full disclosure of all facts they might be able to keep their jobs. The Court found that nothing that Mr. Haines could have said or done on January 31 would have cleared his name or persuaded plaintiff not to serve him (A. 249). It found that he was further misled into thinking that the taking of the "lie detector" test had some significance in clearing his name (A. 257).

Nonetheless, after making the findings above noted, the Court concluded as a matter of law that

> "the purpose of DR 7-104(A)(1) is to prevent the attorney for one party from approaching the client of another without the consent of the lawyer so approached. This is to prevent unseemly professional friction from arising between the two attorneys."

(A. 255) (emphasis added).

That conclusion, we submit, is erroneous. The purpose of the Disciplinary Rules, as well as of the Code of Professional Responsibility itself, is not simply to provide rules of etiquette for the convenience of gentlemen practicing the profession of law. The purpose of the Code, its predecessor Canons, and its Disciplinary Rules, is to provide certain minimal protections for the public who may be unaware of the ground rules by which members of the bar deal with each other and with non-lawyers.

Judge Owen of the Southern District has recently put the matter concisely in Zeller v. Bogue Electric Manufacturing Corporation.

> "It is no answer to say that [the defendant] met voluntarily with attorney Powers. The Disciplinary Rule quite clearly puts responsibility on the attorney to avoid any such meetings, the consequence of which might not be clear to the

> layman on the other side. The Disciplinary Rule would have very little application if it only applied to cases where the layman was somehow forced to involuntarily meet with the opposing lawyer."

71 Civ. 5502, Opinion #42038, filed March 13, 1975. */

The American Bar Association has viewed the purpose of the Canon's prohibition as being, in addition to promoting the proper functioning of the legal profession, ". . . to shield the adverse party from improper approaches . . ." and in that regard stated that the Canon is ". . . wise and beneficient and should be obeyed." (Formal Opinion 108, Committee on Professional Ethics and Grievances, March 10, 1934, American Bar Association); See Attorney-Disciplinary Proceeding, 1 ALR 3d 1113, 1117 (the rule ". . . is for the protection of the client . . .").

Here the violation at issue is not of an Ethical Consideration, but of a Disciplinary Rule, an important distinction in light of the Preliminary Statement to the Code of Professional Responsibility which defines the two as follows:

> "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

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*/ For the convenience of the Court, a copy of the Zeller opinion is annexed as an appendix to this brief.

> "The Disciplinary Rules, unlike Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

It must further be noted that the thrust of the restriction on the attorney does not depend upon an affirmative showing that he in fact obtained confidential information but only that he had improper access to such information. T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. 265, 268 (S.D.N.Y. 1953); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); H. Drinker, Legal Ethics 201-203 (1953).

The inescapable thrust of Judge Brieant's reasoning is that it is up to the intelligent layman to determine whether he is being fairly treated by a member of the bar, whose only obligation is to make sure no brother lawyer's sensitivities -- or fees -- are touched upon. Judge Brieant noted his surprise that Mr. Haines did not:

> ". . . make an obscene suggestion to the attorneys that they place their tape recorders, their 'lie detectors' and their accusations within that orifice in which entire navies, realms and enterprises have been directed to be placed." (A. 257).

The Canon, however, applies to the attorney even if the layman is willing to discuss the matter, as noted by

Judge Owen in Zeller, supra. See also H. Drinker, Legal Ethics 43, citing A.B.A. Formal Opinion 108, and Re Edward Kent, an Attorney at Law, 39 NJ 114, 187 A.2d 718, 1 ALR 3d 1109, 1112.

Here, the "consent" or "willingness" of the layman to meet with the attorneys for Grant was procured by their careful failure to disclose to him that he had been sued for $15 million and that the decision to fire him had already been made.

The circumstances surrounding the commencement of the action and the luring of Mr. Haines into New York and to Grant's offices, found by the District Court as the factual basis for setting aside service of the summons and complaint on him (A. 245-251), make it crystal clear that Grant's counsel consciously and deliberately planned to take unfair advantage of Mr. Haines by concealing from him the fact that he had been sued until they completed their interrogation of him and had subjected him to an electronic lie detector test.

In sum, the Court below placed the responsibility for recognizing the applicability of the Code of Professional Responsibility on the wrong party -- a layman who could not possibly be aware of its requirements.

POINT II. IT IS IRRELEVANT THAT APPELLANT HAD NOT YET RETAINED COUNSEL WHEN HE WAS INTERROGATED

That at the time of the interrogation Mr. Haines had not yet retained counsel is, of course, irrelevant. He had not retained counsel because Grant and the Liebman firm had carefully concealed from him the fact that he had already been sued. If Disciplinary Rule 7-104(A) could be circumvented by taking advantage of the federal procedure which provides for service of process after commencement of an action, the objectives sought to be served by that rule would be completely vitiated. It defies logic that the application of the rule could be escaped simply by delaying service until after plaintiff's counsel had had an opportunity to communicate with and interrogate an already named defendant.

Of course, this is not the law, as is made clear by this Court's recent decision in Ceramco v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975). In that case, the Court considered a situation in which an attorney made telephone calls to a prospective defendant prior to commencement of an action in order to determine whether there was a factual basis which would support laying venue and effecting service of process in the Eastern District of New York. While the Court held that the particular conduct in question was not sufficiently serious so as to require disqualification of counsel, its holding was squarely based on a review of the conduct itself

and of the absence of prejudice to the defendant, and not because the calls had been made prior to the commencement of suit and the retention of counsel.

Unlike the situation in Ceramco where the violation of Disciplinary Rule 7-104(A) by plaintiff's attorney was simply an "unfortunate sensitivity to the etiquette of the Bar, [which] had no possibility of . . . prejudicing the opponent . . .", Ceramco, supra, at 271, the facts in this case are like those in Zeller v. Bogue Electric, supra, where the communication between counsel and the defendant "went to the heart of the contentions between plaintiff and [the defendant] and of the information in [the defendant's] possession." However, the instant situation is far more aggravated than that in Zeller. Instead of the two and one-half hour meeting found violative of the rule in Zeller, in the instant case counsel for Grant subjected defendant Haines to five and one-half hours' interrogation. In addition to the simple communication with respect to the subject matter of the lawsuit that took place in Zeller, in the instant case plaintiff's counsel subjected defendant Haines to an electronic lie detector test. Unlike Zeller where the defendant knew that he was a defendant and voluntarily chose to meet with counsel for the plaintiff without his own counsel, here Grant and its counsel deliberately concealed from Mr. Haines the fact that he was a defendant in the lawsuit.

They also told Mr. Haines that he had no need for an attorney and that if he did they would so advise him (A. 1[illegible].

These distinctions place the instant case squarely within the more flagrant category of violations of the Disciplinary Rule alluded to by Judge Owen in Zeller. The case at bar is clearly one in which Mr. Haines was "somehow forced to involuntarily meet with the opposing lawyer." The device used by plaintiff and its counsel to achieve this result was to conceal from Mr. Haines the fact that he was a defendant and to suggest to him that he had no need to have an attorney present.

The retort that technically DR 7-104(A)(1) does not apply since counsel had not yet been retained is too facile. Firstly, DR 7-104(A)(2) provides that:

> "(A) During the course of his representation of a client a lawyer shall not: . . . (2) give advice to a person who is not represented by a lawyer other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

We now know that Grant's counsel elicited direct and substantial, detailed information concerning the factual

bases of the charges made in their 32-page complaint; they procured written releases for them to secure bank records, tax returns and charge account records (A. 26); and they elicited the names of banks and places where assets subject to possible attachment could be located (A. 18; 26; 39). We were unaware of the extent of this inquiry below since counsel submitted the typed transcription of their interrogation in camera to the District Judge, thereafter resisted having it a part of the record on appeal (A. 308-311), and finally resisted its disclosure to counsel for Mr. Haines (A. 382-390).

It is now plain from a reading of the interrogation (A. 9-40) that Mr. Haines was at no point given the advice only ". . . to secure counsel" as required by DR 7-104(A)(2), but as found by Judge Brieant, was encouraged to talk further by being misled into thinking that he could clear himself and keep his job (A. 25; 27).

The predecessor of DR 7-104(A)(2) read: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel. . . ." Canon 9, A.B.A. Canons of Professional Ethics. Judge Brieant found the conduct of Mr. Kirschner misleading and deceptive (A. 255-257). Breach of the letter as well as the spirit of the Code took place here. The

restrictions of the Code apply no less forceably to transactions by a lawyer with someone not represented by counsel than to persons represented by counsel when their counsel are not present. See A.B.A. Formal Opinions 58 (Dec. 14, 1931), 150 (May 5, 1936); Assoc. of the Bar of the City of New York, Opinions on Professional Ethics, No. 533 (March 6, 1940).

POINT III. THE PREJUDICE TO APPELLANT RESULTING FROM THE CONDUCT OF APPELLEE'S COUNSEL IS SUBSTANTIAL AND CONTINUING

This Court has recognized that in an appropriate case violation by counsel of the Code of Professional Responsibility will require the dismissal of an action against a party whose interests have been improperly damaged or jeopardized by the misconduct. Thus, in Doe v. A. Corporation, 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd. sub. nom. Hall v. A. Corp., 453 F.2d 1375, the Court dismissed an action because of the violation by counsel for the plaintiff of Canon 4. The interests that required dismissal in Doe v. A. Corp. are precisely the same interests which require dismissal here, to wit, preventing the plaintiff from unfairly utilizing against a defendant information improperly acquired by his attorney.

It is respectfully submitted that only dismissal will fully protect Mr. Haines from the plaintiff's improper use of the information acquired by its counsel in the course of the day-long interrogation on January 31, 1975. This is not a case in which counsel has operated independent of and at a distance from his client and where severance of counsel from the case will serve to isolate completely the improperly acquired information and thereby deprive the client of the opportunity to use it improperly. The manner in which Grant through its own employees and its house counsel, as well as its outside counsel, carefully orchestrated the commencement of this suit with the interrogation of Mr. Haines makes it clear that the results of the interrogation and lie detector test have already been made available to various Grant officers and employees and have not remained isolated in the exclusive custody of the Liebman firm. In this regard, it is significant that Grant employees were utilized in setting up the fictitious "real estate meeting" and luring Mr. Haines to New York and were present at the "meeting". It is even more significant that Grant's house counsel, Robert J. Kelly, was present along with the Liebman attorneys during much of the time Mr. Haines was subjected to interrogation and has filed affidavits with the District Court relating alleged admissions to the merits of this litigation (A. 205; 233-34; 236). It is apparent that other Grant employees already

have been furnished with the information extracted from Mr. Haines by the Liebman attorneys and Mr. Kelly and most likely at great length and in rich detail (See A. 216). In these circumstances, the clearest way in which the values sought to be protected by Disciplinary Rule 7-104(A) could be vindicated is by dismissal of Mr. Haines from the lawsuit with prejudice.*/ In this case, such a decision would not constitute punishing a client for the improper acts of its attorneys, since Grant through its own employee house counsel and its other employees actively participated in the conduct which constituted a breach of the Disciplinary Rule.

This Circuit has consistently responded to requests to enforce violations of ethical canons. In Emle Industries, Inc. v. Patentax, Inc., 478 F.2d 562 (2d Cir. 1973), the Court noted that the interests of the public as well as the parties:

> ". . . require this Court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." 478 F.2d at 575.

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*/ It is not inappropriate from the viewpoint of economy of judicial effort to direct dismissal of an action on an appeal from a portion of an order raising that subject indirectly. See Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 70 (2d Cir. 1966).

It is plain that the minimum remedy that is required is that the Liebman firm be disqualified from further representing Grant and that the Liebman firm as well as plaintiff be enjoined from making any further use of the improperly acquired information.

> ". . . the Courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries." Ceramco v. Lee Pharmaceuticals, supra.

That the interrogation of Mr. Haines by the Liebman attorneys violated Disciplinary Rule 7-104(A), to which no exception applies, has been demonstrated. That the unethical conduct has prejudiced Mr. Haines should be obvious.

He was subjected to skilled interrogation by attorneys and to an electronic lie detector test over a period of approximately five and one-half hours. During that time he was exhaustively questioned with respect to precisely those activities and that conduct which constitute the heart of the allegations against him contained in plaintiff's complaint -- claims that he received improper payments for recommending lease proposals.

Counsel encouraged participation in the interrogation by suggesting that candid answers could "clear

your name" (A. 256) at a time they knew (1) Mr. Haines had been sued for $15 million, and they were seeking to attach his assets and (2) that he had been fired by Grant. It is patent that the information thus improperly acquired should not be available to Grant or its attorneys in preparing or conducting their case. The manifest unfairness of the conduct which has taken place can be readily seen when one considers the prospect of these same counsel, who subjected Mr. Haines to this five and one-half hour star-chamber interrogation, now taking his deposition. It is fundamental to the adversary process and to the trial preparation procedures of the Federal rules that while a party is entitled to examine an opposing party, the party being examined is entitled to consult with counsel, to prepare for the deposition in advance, and to have counsel accompany him to, and protect his interests at, his deposition. The conduct of the plaintiff and the Liebman firm have effectively denied these rights to Mr. Haines. */

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*/ The propensity of Grant counsel in this action to ignore the mandates of the Code of Professional Conduct has, unfortunately, had to be called to the Court's attention in connection with another bizarre incident -- a press interview with the New York Times, participated in by a partner in the Liebman firm in which his praises are sung and the defendants are found guilty by association as commercial bribers and violators of penal laws. See Layton Affid., March 6, 1975 (A. 145; 149).

POINT IV. THE ATTACHMENT ORDER DIRECTED TO PROPERTY LOCATED IN ANY DISTRICT IN THE UNITED STATES AND ITS MAINTENANCE FOLLOWING DISMISSAL OF THE ACTION AND VACATION OF SERVICE OF THE SUMMONS AND COMPLAINT IS JURISDICTIONALLY DEFECTIVE

Federal Rule of Civil Procedure 64 now provides

> ". . . remedies providing for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held. . ."

The plaintiff here made application for orders of attachment pursuant to Rule 64 and Article 62 of the New York Civil Practice Law and Rules (A. 104). C.P.L.R. §6211 provides that an order of attachment when granted may be directly only ". . . to the Sheriff of any county or of the City of New York where any property in which the defendant has an interest is located or where a garnishee may be served."

The New York rule is that an attachment must be directed to property "within the jurisdiction of the New York Courts." U. S. v. First National City Bank, 321 F.2d 14, 22 (2d Cir. 1953).

> "It is axiomatic that for property or a debt to be subject to attachment under C.P.L.R. 6202, it must be

> amenable to the jurisdiction of the court."

7 Weinstein, Korn & Miller, New York Civil Practice §6202 at 62-56 (1966). See also Wilcox v. Richmond Rd. Co., 270 F. Supp. 454, 456 (1967).

In some states attachment is permitted to be issued only in the county in which the property is located and it has been held that under Rule 64 that the quasi in rem jurisdiction of the Federal District Court there sitting is by definition so limited. Dunn v. Printing Corporation of America, 245 F.Supp. 875 (D.C. Pa. 1965).

The application for an order of attachment being granted, the Court directed counsel to prepare the order and submit it without notice. Counsel prepared an order directed to any U.S. Marshal in any district in the United States of America and thus, property of Mr. Haines located in Atlanta, Georgia, was ordered attached by a Federal District Court sitting in the Southern District of New York.

No different from the requirement that an attachment order can only reach property within the jurisdiction of the Court is the concept that an order of attachment requires the existence of an action for its maintenance. The action below was dismissed as to all defendants, though with leave to replead. As to Mr. Haines, however, the

service of the summons and complaint was vacated as well, thus requiring proper service on a different occasion. It is a jurisdictional contradiction to sustain or continue an attachment (itself outside the Court's jurisdiction) and levies thereunder in an action that no longer exists.

CONCLUSION

For the above stated reasons, it is respectfully requested that the order of the District Court be reversed to the effect that the complaint be dismissed against defendant Mark S. Haines, or, in the alternative that the firm of Liebman, Eulau, Robinson & Perlman be (1) disqualified from further participation in this action recommenced by an amended complaint; (2) enjoined from divulging the materials elicited from Mr. Haines to replacement counsel; and (3) that plaintiff be directed not to make any use whatever of the improperly acquired information, and its employees or agents who have had access to said information be barred from further participation in the conduct of the litigation;

and that the order of attachment of appellant's property in the State of Georgia be vacated.

Dated: New York, New York
October 3, 1975

Respectfully submitted,

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Of Counsel:

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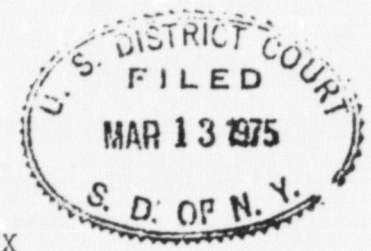
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



HERMAN L. ZELLER,

Plaintiff,

-against-

BOGUE ELECTRIC MANUFACTURING CORPORATION, EDWARD P. SCHINMAN, ROBERT S. HERWIG, WILLIAM S. GUTTENBERG, MURRAY REIFFIN, IRWIN SMALL COMPANY, a partnership, and BELCO POLLUTION CONTROL CORPORATION,

Defendants.

#42038

71 Civ. 5502

MEMORANDUM AND ORDER

OWEN, District Judge.

In this stockholders' derivative action, the attorney for the plaintiff, Lawrence Powers, conducted a two and one half hour interview of an individual defendant William Guttenberg without notifying his counsel and discussed the merits of the case. Guttenberg participated because of the suggestion he might be dropped from the case. Said defendant's attorneys, the firm of Townley, Updike, Carter & Rodgers (hereinafter Townley, Updike), who represent other individual defendants and the alleged wrongdoing corporation Bogue Electric Corp. (hereinafter Bogue) as well, now move for an order dismissing the action on the ground

that plaintiff and Powers do not fairly and adequately represent the interests of the shareholders of the corporation on whose behalf the action is brought. In the alternative they move for an order disqualifying Powers from further representing the shareholders in this action. Plaintiff and Powers oppose such motion and move for dismissal of the action against the interviewed defendant Guttenberg and in the event such motion is not granted they urge that the firm of Townley, Updike be disqualified from representing Guttenberg.

This action was brought on behalf of defendant Belco Pollution Control Corp. (hereinafter Belco) to recover damages from former members of its board of directors, from its accounting firm, and from Bogue, its controlling shareholder. The complaint alleges violations of the Securities Exchange Act of 1934 arising out of certain loans made by Belco to Bogue. In August 1972, another Judge of this Court granted summary judgment to defendants on the ground that repayment of the loan with interest by Bogue had vitiated any securities act violation. The Court of Appeals, though expressing great doubt as to plaintiff's likelihood of ultimate success, reversed the District Court. Since that time there have been extensive but unfruitful efforts at settlement.

The meeting at issue between attorneys Powers and defendant Guttenberg, who from 1968 to 1972 was a director and treasurer of Belco, took place on May 24, 1974. Guttenberg met with Powers in the hope that he would be dismissed from this action which he felt was unwarranted, at least as to him. The meeting was arranged by a non-defendant who at the time of the meeting was a Vice President of Belco but who has since left the corporation's employ. The meeting was held at Guttenberg's office and lasted roughly 2-1/2 hours. During the meeting Guttenberg expressed his opinion of the merits of plaintiff's allegations and provided specific facts with respect thereto.* Powers told Guttenberg not to discuss their meeting with anyone. No attorney from Townley, Updike was informed of the meeting or was present.

On October 1, 1974, at a conference held before me, Townley,Updike having discovered the occurrence of this meeting made the motions now before this Court on the ground that the May 24 meeting constituted a violation of Disciplinary Rule 7-104(A)(1) of Canon 7 of the A.B.A. Code of Professional Responsibility. The rule provides:

> During the course of his representation of a client a lawyer shall not:

*Guttenberg did refuse to show Powers his file on the case which Guttenberg had on his desk during the meeting.

> Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In a letter to the Court dated October 2, 1974, Powers, to his credit forthrightly acknowledged that afterwards he realized his actions were a mistake and were in violation of Disciplinary Rule 7-104(A)(1). In the same letter he offered to dismiss the action against Guttenberg. He now argues that having done this, there is no reason for further penalty against either the plaintiff or himself. He argues that dismissal as to Guttenberg was always in his contemplation since the time the loan from Belco to Bogue was repaid in 1972. He argues that at that point Guttenberg became only a nominal defendant because repayment of the loan obviated any need for injunctive relief, the achievement of which was the principal reason for naming Guttenberg. Further, Powers argues, even if damages were sought against Guttenberg, Guttenberg is comparatively judgment-proof in relation to the large sums being sought and thus, there is little point in proceeding against him. Further, Guttenberg, now having left Belco's employ, had no further motive to conceal wrongful activities of other defendants who were the primary wrongdoers and could now be relied on to provide plaintiff with sufficient discovery in the role of non-party witness. This being the case, Powers argues that his only error was in not seeking dismissal of Guttenberg first and then proceeding

to interview him. Citing Meyerhoffer v. Empire Fire and Marine Ins. Co., 407 F.2d 1190 (2d Cir. 1974) he points out that had he followed this procedure no other defendant could bar Guttenberg from revealing all he knew about the case in order for Guttenberg to protect his own interests. Since the dismissal is now available, Powers continues, he is in possession only of information that he would have acquired in due course and thereby no prejudice has been inflicted on any other defendant. With this line of reasoning I cannot agree.

The fact is that Powers spoke to Guttenberg without permission of Guttenberg's counsel before any dismissal was sought. It is clear that if Guttenberg is a principal wrongdoer and therefore belongs in the case, that Powers would have to be disqualified as a remedy to protect Guttenberg from any unfair advantage that Powers might have achieved by the improper meeting. Unlike in Ceramco v. Lee Pharmaceuticals, _____F.2d_____(2d Cir. Slip Op. P.1543, Jan. 30, 1975) the violation of Disciplinary Rule 7-104(A)(1) by plaintiff's attorney was not simply an "unfortunate insensitivity to the etiquette of the bar, [which] had no possibility of so prejudicing the opponent that the firm should be barred from the case entirely." Ceramco, supra, Slip. Op. at 1548. Rather the meeting between Powers and Guttenberg went to the heart of the

contentions between plaintiff and Guttenberg and of the information in Guttenberg's possession.* Such information was passed and, according to Guttenberg, was only passed because of Guttenberg's belief, never discouraged, that Powers could and would dismiss this action as against him. It is no answer to say that Guttenberg met voluntarily with attorney Powers. The Disciplinary Rule quite clearly puts responsibility on the attorney to avoid any such meetings, the consequence of which might not be clear to the layman on the other side. The Disciplinary Rule would have very little application if it only applied to cases where the layman was somehow forced to involuntarily meet with the opposing lawyer.

In addition to my conclusion that Powers may not further continue as an attorney in the action with Guttenberg as a defendant, I cannot, consistent with my responsibility to ensure that shareholders are "fairly and adequately represented" Fed. R. Civ. P., 23.1, proceed with Power's application to dismiss as against Guttenberg. The attorney representing the shareholders in a derivative action in my view cannot act under any impediment which might conflict with his representing such shareholders and the corporation in an entirely disinterested fashion. Plaintiff's attorney, having admittedly blundered, has a strong motive to dismiss

*According to Guttenberg's affidavit, Powers also asked whether Mr. Stone, a prior attorney for defendants,"knew of any weaknesses in our defense and, if so, what they were."

the action against Guttenberg to dispel the consequences of the blunder and, perhaps avoid disqualification by minimizing Guttenberg's importance to the action irrespective of whether or not Guttenberg should remain in the action in the best interests of Belco and its shareholders. Whether or not it is so, that this influence might be acting upon Powers is a possible inference to be drawn from the timing of this motion to dismiss Guttenberg. The factors pointing to dismissal of Guttenberg have existed for over two years and yet only after this motion was brought did Powers move for Guttenberg's dismissal.* Further there are other defendants in the action who appear to be only as nominally involved as Guttenberg is claimed to be and yet even now, no dismissal is contemplated or suggested as to these defendants.

Thus, while it is possible that dismissal against Guttenberg might be justified at this time, and that Powers might, in fact, be solely moving to dismiss for the benefit of shareholders, the shareholders, who will be bound by any determination in this action, are entitled to be represented by an attorney who will make such a decision possessing no interest potentially divergent to their own.** See

*I note that plaintiff's attorney did not move for dismissal of Guttenberg in the several months between his meeting with Guttenberg and the time this motion was made.

**I am aware that any dismissal of Guttenberg must meet with my approval, Fed. R. Civ. P., Rule 23.1. However, the existence of that power does not mean that I must oversee an action where

 (cont'd on p.8)

Jaffe v. Glickman, 14 Fed. R. Serv. 2d 847 (S.D.N.Y. 1970). Thus I feel compelled to disqualify Powers from representing plaintiff and the other shareholders of Belco in this action, although I see no reason to penalize plaintiff himself for the ethical violation of his attorney.* Further plaintiff's attorney is enjoined from revealing in any manner the contents of any information he obtained at the meeting with defendant Guttenberg on May 24, 1974.

All other applications are denied.

SO ORDERED:

March 11, 1975.

United States District Judge

(fn. from p. 7 cont'd)
there is an obvious possibility of conflict between the plaintiff or his attorney and the shareholders. After all, in considering a compromise or dismissal of a shareholder action, I would normally be entitled to give the recommendation of plaintiff's counsel considerable weight. Further in the normal case, the Court does not involve itself in the business judgment of plaintiff or his attorney but instead satisfies itself that the dismissal is not so unfair as to be outside the range of a reasonable settlement. Glidden v. Bradford, 35 F.R.D. 144 (S.D.N.Y. 1964). Under the circumstances of this case, I could no longer rely on counsel's recommendation and business judgment and instead would have to replace his judgment by mine if I am to be satisfied that the stockholders will have had the degree of representation to which they are entitled.

*Since Powers must be disqualified to protect the shareholders of Belco, I need not reach the issue of whether, in general, defendants other than the individual improperly approached have standing to assert that information damaging to them was improperly derived from a meeting violating Disciplinary Rule 7-104(A)(1).

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ASSUNTA M. SPARANO, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in New York, New York; that on the 10th day of October, 1975, deponent served two (2) copies of the within Brief for Appellant upon:

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the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Assunta M. Sparano
ASSUNTA M. SPARANO

Sworn to before me this
10th day of October, 1975.

Donald M. Crook
Notary Public

DONALD M. CROOK
NOTARY PUBLIC, State of New York
No. 24-4600103
Qualified in Kings County
Cert. Filed in New York County
Term Expires March 30, 1976